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Title to the Soil under Public Waters - The Trust Theory

Everett Fraser

TITLE TO THE SOIL UNDER PUBLIC WATERS*—THE TRUST THEORY

THE history of land titles in America precludes any presumption of ownership of the beds of public waters by the riparian proprietors, and raises a presumption in favor of the state. The ownership of all lands in the American colonies was originally in the crown, and the ungranted lands passed to its sovereign successors. Grants were made by the sovereign to subject or citizen from time to time, but these grants do not appear to have expressly included the beds of public waters as a general practice. By the English common law these beds would not pass by implication in sovereign grants. There is no authority to show that the subaqueous soil of England ever passed in this manner, and there is much authority that such an implication should not be made against the crown. This rule against implication on a crown grant is as old as the presumption of the riparians' ownership of the soils of public fresh waters.[1] The co-existence of the two helps to explain the origin and meaning of the latter. It is a presumption of ownership arising from the general, exclusive enjoyment of the public fresh water beds by the riparians, and this enjoyment must have originated in some way other than by implication in crown grants, as by possession from time immemorial or by express crown grant. But as riparians in America have not, as a general rule, such grants, possession, or enjoyment, there should be no presumption of ownership by them. Moreover, as their original grants may generally be shown, there is no need for such a presumption. Conversely, as the sovereign has seldom expressly alienated the submerged lands, and as they are rarely in the exclusive possession or enjoyment of citizens, the presumption as to all the lands under public waters in America ought to be that of the English common law as to lands under tidal waters, that they remain in the sovereign.[2]

Assuming that title in these lands should be presumed to be in the state, it is not an unqualified ownership. The public as

* Continued from 2 MINNESOTA LAW REVIEW 313.
[1] The Royal Fishery of the Banne, (1610) Davies Rep. 149.
[2] 2 MINNESOTA LAW REVIEW 313.

individuals have certain special rights, quasi-easements and quasi-profits, which are paramount. These include navigation and perhaps fishing and others. They constitute the jus publicum. There may be also certain special rights in the riparians, such as the right of access to the navigable waters.[3] What are public and riparian rights will be considered hereafter; for the present it will be assumed that such exist and that the ownership of the state is subject to them. But these rights are not exhaustive of possible uses of the soil, and the state's ownership, qualified in extent of use as it may be, extends to all the rights not included in these special rights. These residuary rights make up the jus privatum in the land which is presumed to belong to the state.

The next problem is what may the state do with the jus privatum in the subaqueous lands to which it is presumed to have title? May it grant the jus privatum to its citizens? May the state or its grantees make any use of the lands which does not interfere with the jus publicum or with the riparian rights? May the state, for example, mine the minerals in the lands? It is not within the scope of the present article to consider the power of the state to impair or to destroy either the jus publicum or any special riparian rights that may exist. It will be assumed that these are preserved.

The problem is fairly presented in *State v. Korrer*.[4] The state sought to restrain the riparian proprietor from mining iron ore from the bed of a navigable lake, from destroying the waters of the lake, and asked an accounting for any ore unlawfully removed. After commencement of the action a stipulation was made which recited that from a certain area of the lake the waters had already been forced back by the defendants, and that a body of ore had been stripped and prepared for mining, and it was agreed that the defendant might remove the ore so stripped, and that the state should be paid for ore removed which it should finally be adjudged did not belong to the fee owners of the shore land. This stipulation was confirmed by order of court. The defendant had judgment in the lower court, but on appeal it was declared that the state was entitled to an injunction restraining the defendant from taking ore below low water mark, and the cause was remanded.

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[3] Lyon v. Fishmongers' Co., (1876) L. R. 1 A. C. 662, 45 L. J. Ch. 68, 35 L. T. 569; Brisbine v. St. Paul, etc., R. Co., (1876) 23 Minn. 114.

[4] (1914) 127 Minn. 60 (78), 148 N. W. 617.

On petition that further directions be given the trial court as to the stipulation, the Supreme Court said:

"A majority of the court construe this stipulation as giving the state the right to an accounting only in the event that the state is found to be the owner in a proprietary capacity of the mineral underlying Longyear Lake. The decision of this court explicitly holds that the state owns the bed of this lake below low water mark, 'not, however, in the sense of ordinary absolute proprietorship with the right of alienation, but in its sovereign governmental capacity, for common public use, and in trust for the people of the state for the public purposes for which they are adapted.' From this it necessarily follows that the state has no right to recover the value of the ore, and no right to an accounting under the stipulation."

Words of similar import occur in many cases in several jurisdictions.[5] They express the trust theory of state ownership.

The passage quoted is susceptible of various meanings. It may mean that the state has only a special right in the soil, measured by the jus publicum of which it is the conservator. That interpretation has already been considered and the conclusion reached that the state has presumptively the jus privatum as well. Again, it may mean that although the state has title, it must not use its title to the impairment or destruction of the public right. That is doubtless intended, and will be discussed hereafter, but is it the whole meaning? It is true that in *State v. Korrer* the waters had been thrown back to get at the ore, but that had been done before the stipulation for payment of the value of the ore to the state had been entered into, and it is difficult to see how the mining of the ore could further infringe the public right and why the state should not recover for the taking of its property although the taking involved a prior invasion of the public right to which the state was not a party. If the state should not recover for ore so taken, it would appear at least doubtful whether it has the right itself to extract the ore even in a manner nowise interfering with the public right.[6]

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[5] McLennan v. Prentice, (1893) 85 Wis. 427 (444), 55 N.W. 764; Flisrand v. Madson, (1915) 35 S.D. 457 (470), 152 N.W. 796. Compare People v. Kirk, (1896) 162 Ill. 138, 45 N.E. 830, 53 Am. St. Rep. 277; Florida v. Black River Phosphate Co., (1893) 32 Fla. 82, 13 So. 640, 21 L. R. A. 189.

[6] "The governor, attorney general and state auditor are hereby empowered to enter into contracts . . . for the mining and disposing of the iron ore situate under any waters of any public lake or river in the state of Minnesota." Minn. Laws 1917 Chap. 110.

The phrase "sovereign governmental capacity" is equivocal. The state owns all its public lands in this manner, yet it may alienate them. "For common public use" is inapplicable to the minerals in the land, for the use of them is not part of the common public right and could not be from its very nature. Nor is the phrase "in trust for the people of the state for the public purposes for which they are adapted" any more enlightening, for the taking of minerals is not such a purpose.

Few legal phrases are more loosely used than "in trust." In the typical trust A has the legal title to property in which B has the whole beneficial interest. But it is used to describe other situations. A's land is charged with a payment of money to B. He is said thereafter to hold it in trust for B.[7] The capital stock of a corporation is said to be a trust fund for the benefit of its creditors. In the first example A has no beneficial interest and cannot rightfully use or alien the trust property for his own benefit. But in the other examples A and the corporation have beneficial interests and may use the property in any way not inconsistent with the beneficial interests in B or in the creditors.

That the state holds the subaqueous lands in trust with respect to the jus publicum is, for the present, assumed. That it holds them in trust with respect to the just privatum is impossible, unless there may be an inalienable trust without a cestui que trust in esse or in posse. An owner of land subject to an easement may make any use of the land which does not disturb the enjoyment of the easement.[8] The owner of land dedicated for a public highway may take the grass, trees, or minerals from the land, or make other uses thereof, provided he does not hinder the use of the land for highway purposes.[9] These owners hold their lands subject to these special uses. They may be said to hold them in trust for these uses as truly as the corporate state holds the soil of public waters in trust for public purposes. It is submitted that the corporate state has both legal and beneficial interest in the jus privatum, with power to use or alien it for any enjoyment not inconsistent with the public or riparian rights, that the trust theory only requires at the most that these special rights be preserved, and that its extension to include the jus privatum is unsound.

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[7] Woodward v. Walling, (1871) 31 Ia. 533.
[8] Atkins v. Boardman, (1840) 2 Met. (Mass.) 457.
[9] Makepeace v. Worden, (1816) 1 N. H. 16.

The origin to which the trust theory is referred confirms this view. It is frequently said that it was the theory upon which the crown's title to the tidal lands in England was based. In *Union Depot Company v. Brunswick*,[10] the court by Justice Mitchell said that:

"At common law the king as representative of the nation held in trust for them all navigable waters and the title to the soil under them. This was a sovereign or prerogative and not a proprietary right. At the revolution the people of each state became sovereign, and in that capacity hold all these waters and the title to the soil under them for their common use, subject only to the rights since surrendered to the general government."

The statement that the title of the crown to the subaqueous lands was not a proprietary right, if that means without any right of enjoyment or power of alienation, is incorrect. It has no support in the English common law and the authority to the contrary is conclusive. It is true that the ownership of the king was in his sovereign or prerogative right. He was presumed to own the tidal lands as part of the ungranted lands of the kingdom, that being the state of the greater part of them. They were part of the jura regalia of the crown. By the same right he owned the bona vacantia in the kingdom, and the crown estates which went to successors and not to heirs. They were all part of the regalia of the crown, interests attached to the corporate office of the sovereign. The king owned them in right of the crown, and such as remained at his death went by the same right to his successor.[11] But the right in which they were held did not narrowly limit the modes in which they might be enjoyed. The king had the profits of crown lands for revenues.[12] He could use the lands or grant them away. His prima facie title by the prerogative to the tidal lands could be rebutted by proof of a grant to a subject. Revenue might be had from these waste lands which still remained in the crown by granting them away. The power of the king as sovereign to dispose of them was not different from the power of an American state to dispose of its public lands. The corporate state owns its public lands by the same sovereign right, on trust for all the people of the state, and yet with the power of use and alienation to raise revenue for the government, and so for the people through it. The revenue of

[10] (1883) 31 Minn. 297 (300), 17 N. W. 626, 47 Am. Rep. 789.
[11] Co. Lit. 16a, Butler's Note 4.
[12] 7 Halsbury's Laws of England 108, 112.

the state was the revenue of the king under the English constitution. That by the king's grant or charter a subject might have the right of property in the arms and creeks of the sea is asserted by Sir Matthew Hale, adding that it is without question.[13] It has never been denied in the English cases that the crown might grant the fee in the foreshore or other tidal lands where it did not already subsist in the hands of a subject.[14] On the contrary, it made grants of these lands down to the reign of Anne, when the power of the crown to make further grants was modified by act of parliament.[15] It is clear that the terms "sovereign and prerogative" and "proprietary" in the common law were not antithetical but consonant and that the king's title was at once sovereign and proprietary.

The crown, however, held these lands subject to the jus publicum. To say that it held them in trust for the public use is perhaps proper enough in view of the variable meaning of the expression "in trust." It might indeed be said to hold the use privatum in trust as well. But there is a great difference in the administration of the two trusts. It holds the lands as representative of the people, as the corporate state would in America, in trust as to the jus privatum to raise revenue for the purposes of government, and as to the jus publicum to permit the people directly to enjoy them. The one is an active trust; the other is a passive trust. The people have the benefit indirectly in the one case and directly in the other. In the former the people have no property, but only a beneficial interest as members of

[13] De Jure Maris Chap. V (Hargrave's Law Tracts 17).

[14] Hall on the Sea-shore, 14 (Moore's Foreshore 672); Attorney General v. Parmeter, (1811) 10 Price 378; Blundell v. Caterall, (1821) 5 B. & Ald. 268; Attorney General v. Burridge, (1822) 10 Price 350 (371); Duke of Beaufort v. Swansea, (1849) 3 Exch. 413; Corporation v. Ivall, (1871) L. R. 19 Eq. 558; Brew v. Haren, (1874) 9 I. R. C. L. 29; Wyse v. Leahy, (1875) 9 I. R. C. L. 384; Attorney General v. Portsmouth, (1877) 25 W. R. 559.

"From the earliest times in England the law has vested the title to, and the control over, the navigable waters therein, in the crown and Parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the oil, analogous to the ownership of dry land, was regarded as *jus privatum,* and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum,* and was vested in Parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by Parliament." Per Earl, J., in Langdon v. Mayor, etc., of City of New York, (1883) 93 N. Y. 129 (155).

[15] 1 Anne Chap. 7 Sec. 5; Coulson and Forbes, The Law of Waters.

the state; in the latter they have a direct enjoyment. The analogy of shareholders' interests in a business corporation is apt. The shareholders do not own the property of the corporation, although they have an interest in its management. The corporation by its corporate officers has the control and power of disposition of the property for the corporate purposes. But when a dividend has been declared, the shareholders' interests therein are direct and regarded as antagonistic to the corporation.[16] So the crown had complete control over the jus privatum in the land for the purposes of government, while its subjects' interests in the jus publicum were direct and antagonistic. The limitation on the crown's power over the jus privatum was the duty to preserve the jus publicum.

The disputed question in the English cases was not whether the crown could grant the fee in the tidal lands, but what public uses the lands should be subject to in the hands of the crown's grantees.[17] That they should be subject to the public right of navigation was clear.[18] They were also subject to the public right of fishing on grants made after Magna Charta.[19] They were free from any public right of bathing.[20] But whatever were the public rights to be subtracted, the residuary rights, the jus privatum, remained to be enjoyed by the crown or by its grantees.

An effective cause of the error that the crown's title to the tidal lands was on an inalienable trust, and also of the trust theory in America, was that other fundamental error widely current in the American cases that the reason of the crown's title to the tidal lands was the navigability of tidal waters and the duty of the crown to preserve the public right of navigation.[21] To explain the riparian ownership of fresh water soils, and so to maintain the reason, it was repeatedly said that only tidal waters were navigable in England. The same reasoning used to establish the crown ownership of the tidal lands, in the first instance,

[16] Beers v. Bridgeport Spring Co., (1875) 42 Conn. 17.

[17] Attorney General v. Tomline, (1880) L. R. 14 Ch. Div. 58, 49 L. J. Ch. 377; Weston v. Sampson, (1851) 8 Cush. (Mass.) 347, 54 Am. Dec. 764.

[18] Gann v. Free Fishers of Whitstable, (1865) 11 H. L. C. 191, 20 C. B. N. S. 1.

[19] Carter v. Murcot, (1768) 4 Burr. 2162; Warren v. Matthews, (1704) 1 Salk. 357; Duke of Somerset v. Fogwell, (1826) 5 B.&C. 875 (884); Malcomson v. O'Dea, (1863) 10 H. L. C. 593 (618).

[20] Blundell v. Caterall, (1821) 5 B. & Ald. 268.

[21] 2 MINNESOTA LAW REVIEW 326; Carson v. Blazer, (1807) 2 Binn. (Pa.) 475, 4 Am. Dec. 463; The Daniel Ball, (1871) 10 Wall. (U. S.) 557 (563), 19 L. Ed. 999; Illinois Central R. Co. v. Illinois, (1892) 146 U. S. 387, 36 L. Ed. 1018, 13 S. C. R. 110.

required its continuance. So it was argued that the crown cannot alienate the lands. It is curious how this a priori reasoning, ostensibly based on the English common law, persisted in America despite the fact that all the English authority was against it. It was only sustained by referring to cases where the jus publicum itself was in issue. Regarding the title to the subaqueous soils as a matter of law, and assigning the duty of conserving the public right of navigation as the reason of the crown's title to the tidal lands, have at once led some American courts to say that the crown held the lands on an inalienable trust and to hold that the state in America holds the title to the soils under all navigable waters, and upon a similar trust. It has already been pointed out that the common law treats title to subaqueous lands as a question of fact, with a presumption as to tidal land in favor of the crown, and that this presumption arose not from the navigability of tidal waters but from the fact that the tidal lands had not been generally alienated. The true reason is sufficient cause for presuming title to all subaqueous lands in the state, but not for holding them to be on an inalienable trust. On the contrary, it admits the alienability of the lands, at least in respect to the jus privatum.

The American decisions do not support the extension of the trust theory to the jus privatum, however much their dicta might justify it. The actual decisions have been on questions of the public right. In *Martin v. Waddell,*[22] important as a main source of the trust theory, Waddell brought ejectment in the circuit court of the United States for a several oyster fishery of one hundred acres of tidal land in a bay of New Jersey against Martin who also claimed a right of fishery. The plaintiff derived his title by mesne conveyances from the Duke of York, who had received the patent of this territory from the English crown. All governmental power granted by the crown patent to the Duke of York had been surrendered to the crown by later proprietors before the grant under which the plaintiff claimed had been made by them. The plaintiff had verdict and judgment, but the judgment was reversed in the federal Supreme Court on the ground that the dominion and property in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the Duke, to be held on the same trust on which they were held by the crown; that they were

[22] (1842) 16 Pet. (U. S.) 367, 10 L. Ed. 997.

returned to the crown by the surrender of the governmental powers, so that the proprietors could not thereafter grant an exclusive right of an oyster fishery in the bay. The decision is logical, if planting and growing oysters in a tidal bed is part of the public right. But the opinion of the court, rendered by Chief Justice Taney, discusses the problem as if the ownership of the soil were inseverably connected with the public right and as if the right were dependent upon the continuance of the ownership in the governing power. The opinion contains the important dictum which has been reiterated with variations in the trust theory cases:

"When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government."[23]

The opinion ignores the jus privatum and discusses the problem as if the jus publicum were exhaustive of the possible uses of the land. The defect is clearly pointed out by Justice Thompson, who said in a dissenting opinion:

"That the title to land under a navigable stream of water must be held subject to certain public rights, cannot be denied. But the question still remains, what are such public rights? Navigation, passing and repassing, are certainly among these public rights. And should it be admitted that the right to fish for floating fish was included in this public right, it would not decide the present question. The premises in dispute are a mud flat; and the use to which it has been and is claimed to be applied, is the growing and planting of oysters. It is the use of the land, and not of water, that is in question. For the purpose of navigation the water is considered as a public highway common to all; like a public highway on land. If land over which a public highway passes is conveyed, the soil passes subject to that use, and the purchaser may maintain an action, for injury to the soil, not connected with the use; and whenever it ceases to be used as a public highway, the exclusive right of the owner attaches; so with respect to land under water, the public use for passing and repassing, and all the purposes for which a public way may be used, are open to the public; the owner, nevertheless, retaining all the rights and benefits of the soil that may not impede or interfere with the public highway. Should a coal mine, for instance, be discovered under such highway, it would belong to the owner of the soil, and might be used for his benefit, preserving unimpaired the public highway. So, with respect to an oyster

[23] Ibid. at p. 410.

bed, which is local and is attached to the soil. It is not the water that is over the beds that is claimed; that is common, and may be used by the public; but the use of the soil by the owner which is consistent with the use of the water by the public, is reserved to the owner."[24]

Pollard's Lessee v. Hagan,[25] the most important case on the trust theory, was decided by the federal Supreme Court three years later. The decision is the culmination of a series of cases from the state of Alabama which presented the question of the ownership of the subaqueous lands in states once territories of the United States.[26] When Alabama was admitted to the Union in 1819, the federal government reserved title to the public lands in the state. It thereafter attempted to grant to private persons lands which were covered by the tidal waters of the Bay of Mobile when Alabama became a state. The final decision was that the federal government no longer owned these subaqueous lands, but that they belonged to the state. The pertinent history of the litigation is as follows:

The supreme court of Alabama decided in *Hagen v. Campbell*[27] that a grant of lands extending to the channel, which was made by congress before the union, was valid. The court said: "The shore below the common tide belongs to the public, though by grant it may become the property of the citizen," showing that no trusteeship in the then sovereign was present to the mind of the court. As to the federal grants after statehood, several cases were disposed of by both the Alabama and the federal Supreme Courts on the construction of the grants, without questioning the power of the federal government, but in *Mayor v. Eslava*[28] the Alabama supreme court held that the federal government had no power to make such grants, for the reasons, inter alia,—

"By the acts of congress regulating the survey and disposal of the public lands, the federal government has renounced the

[24] Ibid. at p. 421.

[25] (1845) 3 How. (U. S.) 212, 11 L. Ed. 565.

[26] Hagen v. Campbell, (1838) 8 Port. (Ala.) 9, 33 Am. Dec. 267; Pollard's Heirs v. Kibbe, (1839) 9 Port. (Ala.) 712, reversed (1840) 14 Pet. (U. S.) 353, 10 L. Ed. 490; Mayor and Aldermen of the City of Mobile v. Eslava, (1839) 9 Port. (Ala.) 577, 33 Am. Dec. 325, affirmed (1842) 16 Pet. (U. S.) 234, 10 L. Ed. 948; Mobile v. Hallett, (1842) 16 Pet. (U. S.) 261, 10 L. Ed. 958; Mobile v. Emanuel, (1843) 1 How. (U. S.) 95, 11 L. Ed. 60; Pollard's Lessees v. Files, (1841) 3 Ala. 47 reversed (1844) 2 How. (U. S.) 592, 11 L. Ed. 391; Pollard's Lessee v. Hagan et al., (1845) 3 How. (U. S.) 212, 11 L. Ed. 565.

[27] (1838) 8 Port. (Ala.) 9, 33 Am. Dec. 267.

[28] (1839) 9 Port. (Ala.) 577 (604), 33 Am. Dec. 325.

title to the navigable waters and the soil covered by them. . . . The original states, in virtue of their royal charters, are entitled to the right of property in the navigable waters within their territory, while the public are only entitled to an easement. . . . Alabama is admitted into the Union on an equal footing with the 'original states' and of consequence is entitled to the right of property in the tide waters within its limits. By the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the state succeeded to all the rights of the United States."

The decision was affirmed by the federal Supreme Court on the construction of the act of congress, without examination in the opinion of the court of the reasoning of the Alabama court. But that reasoning was adopted in *Pollard's Lessee v. Hagan,* which followed shortly after. The opinion of the court was given by Justice McKinley, who said:[29]

"Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories. . . .

"When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity

[29] (1845) 3 How. (U. S.) 212 (222), 11 L. Ed. 565.

to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.

"Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. But her righs of sovereigny and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin and others v. Waddell,* 16 Peters, 410, the present chief justice, in delivering the opinion of the court, said: 'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights. . . .[30]

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, 'and the laws which shall be made in pursuance thereof.'

"By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and juris-

[30] Ibid. at p. 228.

diction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."[31]

These cases considered together establish:

1. The United States had both sovereign and proprietary interest in the territory out of which Alabama was formed.

2. Such sovereign and proprietary interest included the public waters and the soils under them.

3. Riparian titles did not include soil under the waters of the Bay of Mobile, being tidal waters.

4. The federal government could grant the soil under the Bay to private persons.

5. It reserved title to the public lands upon the admission of Alabama as a state.

6. It ceased to have power to grant the soil under the Bay upon the admission of Alabama as a state.

Subaqueous lands are thus distinguished from public lands. The former pass to the state, although the latter are reserved. Where did the proprietary right in them go? That the state would have the powers of sovereignty, including regulation of navigation and fishing, save in so far as they were granted to the United States by the federal constitution, is clear. But did it get the proprietary right as well? It was not in the riparians. It is no longer in the United States. The argument of counsel for the defendant in *Pollard's Lessee v. Hagan* is illuminating:[32]

"A right to the shore between high and low water mark is a sovereign right, not a proprietary one. . . . The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open: they are not land which may be sold, and the right to them passes with a transfer of sovereignty."

By ignoring the jus privatum and treating the title to the soil and waters as altogether a trust to be maintained by the sovereign, it is made to pass to the state.

The doctrine was vigorously opposed by Justice Catron. In a separate opinion in *Mayor v. Eslava,* referring to the reasoning of the supreme court of Alabama, he said:[33]

[31] Ibid. at p. 230.
[32] Ibid. at p. 215.
[33] (1842) 16 Pet. (U. S.) 234 (254).

"That the original states acquired by the Revolution the entire rights of soil, and of sovereignty, is most certain. And if it be true that Alabama was admitted on an equal footing in regard to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable waters; and so can nine other states equally hold, to the utter destruction to all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a common fund of the Union.

"The clause inserted into the constitution of Alabama, reserving the rights of property to the United States, as a compact with them, embraces lands under water as emphatically as those not covered with water. But if no stipulation saving the interest of the United States had been made, they would have had just as much right to their private property as an individual had to his. They hold, as a corporation, an individual title. . . .

"That such waters are common for the purposes of navigation and commerce, in the widest sense, is free from doubt; that Alabama has jurisdiction and power over them, the same as the original states have over their navigable waters, is equally clear. Yet it does not follow that the fee of the shores, banks, and soils under water, is in the state of Alabama. The United States, as owner, can do no act to obstruct the free public use of the waters, more than a private owner of the soil under water could obstruct the navigation. The individual owner in fee of the bottom of a navigable river, can cultivate and take out the shell fish or the minerals from the bed; nor can it be doubted that the United States may pursue veins of silver, tin, lead, or copper, under the bottom of a bay, the river Mississippi, or a great lake; although they could not impede in any degree their navigation. So may the assignees or lessees of the United States do the same. Nor can it be otherwise in regard to the occupation of the lands between high and low water mark."

And in a dissenting opinion in *Pollard's Lessee v. Hagan,* he said:[34]

"Between 1840 and 1844, a doctrine had sprung up in the courts of Alabama, (previously unheard of in any court of justice in this country, so far as I know,) assuming that all lands temporarily flowed with tide-water were part of the eminent domain and a sovereign right in the old states; and that the new ones when admitted into the union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of state sovereignty, and thereby defeated the title of the United States, acquired either by the treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the courts, it was not entirely so in the political discussions of the country; there it had been asserted, that the new states coming in, with equal rights appertaining to the old ones, took the high lands

[34] (1845) 3 How. (U. S.) 212 (230).

as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a state. . . .

"That the lands in contest, and granted by the acts of 1824 and 1836, were of the description of 'waste or unappropriated,' and subject to the disposition of the United States, when the act of Congress of the 2d of March, 1819, was passed, is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government; and this in regard to any lands that could be granted. And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a state to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the state, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles. It follows, if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist. And to this conclusion, as I understand the reasoning of the principal opinion, the doctrine of a majority of my brethren mainly tends. The assumption is, that flowed lands, including mud-flats, extending to navigable waters, are part of such waters, and clothed with a sovereign political right in the state; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction; and being part of state sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of the United States are declared void: conceding to the theory all the plenitude it can claim, still Alabama has only political jurisdiction over the thing; and it must be admitted that jurisdiction cannot be the subject of private grant. . . .

"In *Pollard's Lessee v. Files,* 2 How. 602, the question, whether Congress had power to grant the land now in controversy, was treated as settled. As the judgment was exclusively founded on the act of 1836, (the plaintiff having adduced no other title,) it was impossible to reverse the judgment of the Supreme Court of Alabama on any other assumption than that the act of Congress conferred a valid title. I delivered that opinion, and it is due to myself to say, that it was the unanimous judgment of the members of the court then present.

"I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this court, either as it respects the amount of

property involved, or the principles on which the present judgment proceeds—principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores."

Pollard's Lessee v. Hagan is the Magna Charta of the later-admitted states to the soils under their public waters. Its principles were later extended to navigable non-tidal waters in states formed out of territories of the United States. "They (*Martin v. Waddell* and *Pollard's Lessee v. Hagan*) enunciate principles equally applicable to all navigable waters."[35]

The point decided in *Pollard's Lessee v. Hagan,* that the United States has no proprietary interest in the soil of the public waters of a state has been steadily adhered to. The Supreme Court of the United States has not, on the other hand, insisted on any particular manner of holding of these soils by the state. While they were given to the states on the trust theory as a sovereign right, the states are left free to deal with them as they see fit.

"If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which these grants were situated."[36]

The state is thus free to adopt whatever rule it pleases with regard to these lands. Assuming for the present that it may not destroy or impair the public right, yet since that right is not exhaustive of all the beneficial uses of the lands, there is a residuary interest which may be disposed of. To deny that power is to say that there are beneficial uses of the lands, harmful to no one, but incapable of enjoyment by anyone. The doctrine of *Pollard's Lessee v. Hagan* has accomplished its purpose; it has given the title to the state. But it did so on the assumption that the public use included the whole beneficial enjoyment. The United States held these lands subject to the public right; it could grant the fee in them subject to the same right; the fee might logically have been held to remain in it by the reservation of the public

[35] Justice Bradley in Barney v. Keokuk, (1876) 94 U. S. 324 (338), 24 L. Ed. 224. Cases in which the doctrine is stated are collected in Kean v. Calumet Canal Co., (1902) 190 U. S. 452 (481), 47 L. Ed. 1134, 23 S. C. R. 651.

[36] Barney v. Keokuk, (1876) 94 U. S. 324, 24 L. Ed. 224.

lands when the territory became a state; it was, however, held to have passed to the state; the state holds the fee subject to the same public right, and with the same power of use and disposition that the United States had before the admission of the state.

The courts of several states, regarding the way by which the state's title to the subaqueous lands is derived, use language that would limit the interest acquired, or the manner in which it may be enjoyed. They call it a sovereign or prerogative and not a proprietary right. It is true that the title passes to the state as an incident of sovereignty. But analysis of the cases from which the doctrine originated shows that every right in the lands passes which the United States had before. Cognizance should be taken of the fact that the United States had a proprietary right and exercised a power of disposition over these lands during the territorial status, and the interest and power of the state should be held to be equally extensive. There is no reason for limiting the power of the state more narrowly than the power of the crown or of the United States was limited. And we have seen that they could use or dispose of such interests as could be enjoyed subject to the public right. The sovereign should be able to make such use of each interest in the lands as may best subserve the public good directly or indirectly.

That the state should have power to make such disposition of these lands as will not impair the public right has been stated by the federal Supreme Court itself. In *Illinois C. R. Co. v. Illinois*[37] the Court held void a grant which it construed as giving control of navigation of Chicago harbor to a railroad company. In the opinion of Justice Field, colored as it is by the idea of the inseparableness of government ownership and the public use, it is said:

"The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language

[37] (1892) 146 U. S. 387, 36 L. Ed. 1018, 13 S. C. R. 110. And see Hoboken v. Pennsylvania R. Co., (1887) 124 U. S. 656 (688), 31 L. Ed. 543, 8 S. C. R. 643; Shively v. Bowlby, (1893) 152 U. S. 1, 38 L. Ed. 331, 14 S. C. R. 548.

of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

The reiteration of the dictum that the state's title is not proprietary, and that it is without any power of alienation, has had peculiar results in Minnesota. The subaqueous lands were in part obviously useless for direct public purposes. The courts have consequently been not unwilling to resign the enjoyment of these lands to riparian proprietors. Riparian rights have grown to an unusual fruition through the influence of the doctrine.[38] *State v. Korrer,* however, seems to deny the riparians' right to minerals and the state's right as well. The decision is the logical, but absurd result of the doctrine.[39]

EVERETT FRASER.

UNIVERSITY OF MINNESOTA.

[38] Brisbine v. St. Paul R. Co., (1876) 23 Minn. 114; Carli v. Stillwater Co., (1881) 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; Union Depot v. Brunswick, (1883) 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; Lake Superior Land Co. v. Emerson, (1888) 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679; Miller v. Mendenhall, (1890) 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219; Hanford v. St. Paul Co., (1890) 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722.

[39] On right to minerals in beds of public waters, see article by Justice Oscar Hallam, 1MINNESOTA LAW REVIEW 34.